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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

ANTHONY R. FIELDS,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED

Whether petitioner was entrapped as a matter of law?

Whether petitioner's acquittal of the first of a series of four transactions precludes his conviction on the last three?

Whether the district court's failure to clarify the time to be looked to in determining predisposition, especially after the jury's request, was error?

Whether the sentence given petitioner who went to trial either was or appeared to be a penalty for his election to proceed to trial, such as to have a chilling effect on the exercise of constitutional rights?

## TABLE OF CONTENTS

Page

Questions presented ..... 1

Table of Contents .....ii

Table of Authorities .....iii

Opinion Below ..... 2

Jurisdiction ..... 2

Constitutional Provisions and Statutes ..... 3

Statement of the Case ..... 3

Argument .....12

Conclusion .....27

## TABLE OF AUTHORITIES

Bollenbach v. United States,
326 U.S. 607 (1945)..... 20

Dunn v. United States,
284 U.S. 390 (1931)..... 23

Harris v. Rivera, ___ U.S. ___
(No. 81-17, Dec. 14, 1981) .... 23

Lopez v. United States,
373 U.S. 427 (1963)..... 12

Masciale v. United States,
356 U.S. 386 (1958) ..... 13

North Carolina v. Pearce,
395 U.S. 711 (1969) ..... 26

Sherman v. United States,
356 U.S. 369 (1958) ..... 16,18

Sorrells v. United States,
287 U.S. 435 (1932) ..... 17

United States v. Anderton,
629 F.2d 1044 (5th Cir., 1980). 22

United States v. Duff,
555 F.2d 187 (7th Cir., 1977).. 14

United States v. Rech,
589 F.2d 1025 (10th Cir., 1978) 24

United States v. Russell,
411 U.S. 423 (1973) ..... 14

United States v. Silver,
457 F.2d 1217 (3d Cir., 1980).. 22

United States v. Stockwell,
472 F.2d 1186 (9th Cir., 1973). 26

United States v. West,
511 F.2d 1083 (3d Cir., 1975).. 19

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ANTHONY R. FIELDS,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I.

ANTHONY R. FIELDS (hereinafter Petitioner), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming his convictions in the instant case for knowingly acquiring and possessing food stamp coupons in a manner not authorized by law.

## II.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit,___ F.2d ____, is as of yet still unreported. It is reproduced as Appendix A to this petition.

## III.

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 14, 1982. This petition is timely filed under Supreme Court Rule 20.1.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## IV.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V

United States Constitution, Amendment VI.

18 U.S.C. 2 & 846

7 U.S.C. 2024 (b)

The constitutional and statutory provisions are reproduced as Appendix B.

## STATEMENT OF THE CASE

In May of 1981, Petitioner was charged in a five-count indictment with conspiracy to violate 7 U.S.C. 2024(b) and four substantive violations of 7 U.S.C. 2024 (b) (unauthorized acquisition or possession of food stamp coupons), the four substantive counts occurring on February 18, 1981, February 26, 1981, March 26, 1981, and April 24, 1981. A co-defendant, Eugene Carter, pleaded guilty and was sentenced to 90 days incarceration. Upon the government's motion, the conspiracy count was dismissed.

The case proceeded to trial before the Honorable James E. Noland sitting with a jury. The defense was one of entrapment as to all four remaining counts. The jury returned a verdict of not guilty with respect to the first transaction (February 18, 1981) but returned guilty verdicts as to the later three transactions (February 26, 1981, March 26, 1981, and April 24, 1981). Upon the three verdicts of guilty petitioner was sentenced to two concurrent terms of three years imprisonment, and imposition of sentence on the remaining count was suspended, the petitioner being placed on probation for a period of five years to commence upon petitioner's release from prison.

Timely appeal was taken to the United States Court of Appeals for the Seventh Circuit, jurisdiction being invoked under 28 U.S.C. Sec. 1291. The Court of Appeals by

opinion filed September 14, 1982, affirmed the judgment of conviction and sentence. By appropriate orders, the mandate of the Court of Appeals was stayed pending this petition and petitioner has remained enlarged on bail.

As far as is relevant to this petition, the evidence developed at trial involves Ernest Stanford and Robyn Stewart, government agents; William Allen, a government informant who was "working off" a pending charge, Eugene Carter, the co-defendant and Anthony Fields, petitioner.

The agents testified that the government devised a scheme to sell food stamp coupons at a cut-rate price. (R.Vol.II, pp. 238, 253) By implementation of this scheme, the agents made the initial approach to petitioner on each of four occasions, induced him to acquire and possess the food

stamp coupons and then arrested him for acquiring and possessing the food stamp coupons.

The agents were involved in an investigation absolutely unrelated to petitioner when the agents through the informant Allen were introduced to the co-defendant Carter, a trafficker in weapons and narcotics. Carter indicated that he "might" know someone who would be interested in buying food stamp coupons. The agents, the informer and Carter drove to D & P Variety Store, petitioner's place of business. Carter went into the store while the others waited outside.

(Prior to this first meeting with petitioner on February 18, 1981, according to the agents, they had no information at all about petitioner, and most certainly, no information that he was involved in illicit dealings in food stamps. The agents on this

occasion, however, and each of the following ones, initiated the contact. Never did petitioner call the agents to initiate a transaction. Once, coming to petitioner's store and finding that he was not present, the agents even called around to find him to have him come to the store. Admittedly toward the end of the first transaction petitioner expressed a willingness to make future purchases and gave the agents telephone numbers where he could be reached for that purpose.)

When petitioner came outside, the agents asked if he was interested in dealing in food stamps. Petitioner, according to the agents, expressed a willingness to talk about the idea. The agents then gave petitioner their "pitch." On this date and on the following dates, according to the agents' testimony, petitioner said that he did not want to buy stamps that were "hot"

or stolen. (R.Vol.II, pp.254-56, 343-44.) Petitioner said that he did not want to get into trouble or be arrested. (R.Vol.II, p.229) On each date the agents calmed his fears. (R.Vol.II, pp. 343-4) The agents informed petitioner that Agent Stewart worked in a food stamp office and got the stamps before they were sent out. (R.Vol.II, p.250) Agent Stewart testified that petitioner, a black merchant in a poor black area, was led to believe that he had hit upon a bonanza, a get-rich-quick plan; that petitioner could safely make a lot of money because the stamps were "clean" (not stolen?) (R.Vol.II, pp. 230-31) Agent Stanford testified that he told petitioner the stamps were good, that there was no way they would give him stamps that were bad or give him a "raw deal." (R.Vol.II, p.250)

According to the agents, on two of the later dates, February 26, 1981 and April 24, 1981, in efforts to overcome petitioner's reluctance, they threatened to take their business elsewhere (R.Vol.II, p.211) and prompted him to make a hurried decision, telling him they were in a hurry and that if he wanted to buy the stamps he would have to do so right then. (R.Vol.II, p.223)

On the date of the last transaction the agents had brought a much larger amount of stamps than on previous occasions, but petitioner did not have the full amount of cash, and in perhaps a telling statement, the agent added that petitioner therefore could not "do the amount of stamps that we wanted him to do." (R.Vol.II, pp. 247-48) Petitioner was arrested at the conclusion of the fourth transaction.

In short, the agents, according to their own testimony, pursuant to a government formulated plan, made the initial contact with petitioner, about whom they had no information that he was dealing in illicit food stamps, and by representations leading him to believe he could make large amounts of money, and at the same time overcoming his hesitance by assuring him that the stamps were not "hot" and that he could not get into trouble by purchasing them, induced him to acquire and possess the stamps so that they could arrest him for doing so.

At the conclusion of the evidence the district court, after refusing defense instructions relative to entrapment and predisposition, gave certain pattern jury instructions of the Seventh Circuit Court of Appeals on the entrapment defense. The jury during its deliberations sent out a note requesting a legal dictionary. Later, at

approximately midnight, after 13 hours of deliberation, the jury sent out a note requesting clarification of the operative time period on the question of predisposition, "Does prior intent or predisposition mean prior to the proposal or prior to the offense?" The district court during a telephone conference call with the attorneys, not in the presence of the petitioner, decided to refer the jurors to the previously given instructions.

The jury acquitted petitioner of the first transaction, even though petitioner, having taken the witness stand to support his entrapment defense, admitted to having acquired and possessed the stamps on that date. The jury, however, returned verdicts of guilty as to the later transactions.

At the sentencing hearing it was developed that the government had made a pretrial offer to petitioner and to the co-defendant that upon pleas of guilty the government would recommend 90 days imprisonment. Carter entered a guilty plea, the government made its recommendation of 90 days, and the district court accepted that recommendation in imposing sentence on Carter. Petitioner, who exercised his right to trial, was sentenced to two concurrent terms of three years imprisonment to be followed by a period of five years probation.

## V.

## ARGUMENT

### REASONS FOR GRANTING PETITION

1. This cause presents significant questions relative to entrapment, a subject upon which not only the various Circuits of the Courts of Appeals but even this Court has been "sharply divided." (Lopez v. United States, 373 U.S. 427, 434 (1963).) No decision of this Court has dealt with a situation where as here the government furnishes the sine qua non of an offense to one who was not previously and actually engaged in the commission of that offense. The case also presents a question of the moment in time at which the question of predisposition must be determined, the decision below appearing to be in conflict on this point with earlier decisions of this Court, and of another Circuit. Important and recurring

questions would be resolved were this Court to grant this petition.

Many cases have dealt with a defense claim that the government supplied to the accused the subject matter of the conviction. These claims are usually presented in one of two ways. In the first, the defense claims that because the defense testimony is that the material, usually narcotics, came from the government and such testimony is unrebutted, entrapment has been established as a matter of law. Generally the cases hold that the question is one for the jury despite the lack of rebuttal evidence. (Eg. Masciale v. United States, 356 U.S. 386 (1958).) In the other type of case the defense claims entitlement to an instruction requiring acquittal upon a finding that the government supplied the contraband, regardless of the defendant's predisposition to commit the particular offense. Generally

the cases hold no error in refusing such an instruction. (Eg. United States v. Duff, 551 F.2d 187 (7th Cir., 1977).)

But few are the cases such as the instant case where both the government and the defense agree that the material, the possession of which is prohibited, came from the government. In these cases the question of entrapment presents itself most clearly.

Even in these cases, this Court has held that the defense of entrapment will not be available to one who is already engaged in the commission of the offense at the time the government first approaches him, despite the fact that the government later supplies him with the contraband or its necessary ingredients. Thus, in United States v. Russell, 411 U.S. 423 (1973) the defendant's admission and other evidence of his previous manufacturing of methamphetamines as well as his concession of predisposition rendered

the entrapment defense unavailable to him.

We hope that by the foregoing discussion we have clarified the type of case presented here. We deal with one who was prosecuted for possessing that which was put into his hands by the government; one who did not first approach the government agents, but who was first approached by them with a plan of government design; one who was shown even then not to have committed the offense until the government overcame his expressed reluctance with representations of easily made gains and assurances that he could not get into trouble; one who was not shown to have previously committed the offense, and one who does not concede predisposition. Under any test of entrapment, or of a due process notion of outrageous government conduct in instigating an offense, this conviction should not stand.

Sherman v. United States, 356 U.S. 369 (1958) made clear that "ready complaisance" (we suggest, not present here) and even proof of prior convictions for the same offense (again not present here) are not sufficient to establish predisposition where the defendant is not currently involved in the commission of the same type of offense, or in "the trade" as this Court put it. (356 U.S. at 375) The Court of Appeals below, by restating the same evidentiary facts in several different ways, found "ample evidence" of predisposition in almost solely the fact that petitioner committed the offense. Certainly a defendant must admit to the commission of the offense in order to claim entrapment in the first instance , but that does not rule out entrapment where there is no showing that he was in "the trade."

Of this Court's decisions, perhaps the most similar to the instant case regarding predisposition is Sorrells v. United States, 287 U.S. 435 (1932), the seminal case on entrapment. There the agent, on the first date he met Sorrells, asked Sorrells to obtain some whiskey for him; after two refusals and some war-time reminiscences, Sorrells agreed, and left. After but a few minutes he returned with the whiskey. Despite that it was the first meeting of agent and defendant, despite the number of refusals being only two, despite the fact that it only took but a few minutes for Sorrells to obtain the whiskey, giving rise to an inference of a readily known source, and despite even testimony that Sorrells had the reputation of a "rum-runner," this Court reversed the conviction, finding Sorrells to be an otherwise innocent person whom the government was seeking to punish for an

offense the product of its own creative activity. (287 U.S. at 451) This is a most fitting description of petitioner.

2. Apparently, the jury agreed with this description to some extent, since in the face of the government's evidence and the petitioner's own admissions that he had purchased the stamps, the jury acquitted petitioner of the first transaction. Clearly, on this state of the record the acquittal involved a finding of entrapment.

The Court of Appeals below in addressing this contention stated that a finding of entrapment on the first transaction does not taint the convictions on the later transactions. Most respectfully it is suggested that this statement is directly contrary to this Court's holding in Sherman v. United States, 356 U.S. 369, 374, (1958):

> It makes no difference that the sales for which petitioner was convicted occurred after a series of sales. They were not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement.

(See also: United States v. West, 511 F.2d 1083, 1086 (3d Cir., 1975).)

3. The Court below, in further refutation of this argument suggested that the matter was one of inconsistency between verdicts which is not held to require reversal of a conviction. Were it not for an obvious problem with the district court's instructions, we might be constrained to agree.

Petitioner had offered an instruction relative to predisposition specifying that predisposition means a previous or prior

inclination or tendency to do an act. (See: Appendix C) The district court refused the instruction in favor of pattern instructions promulgated by the Seventh Circuit Court of Appeals (See: Appendix C) which did not specify when in respect to the transactions the question of predisposition was to be determined.

Near midnight, after approximately 13 hours of continuous deliberation and after having first requested a legal dictionary, the jury sent out a note asking, "Does prior intent or predisposition mean prior to the proposal or prior to the offense?" The district court in reply referred the jury again to the previously given instructions.

Petitioner argued below and argues here that such response was error, and fell within this Court's holding in Bollenbach v. United States, 326 U.S. 607, 612-13 (1945):

An experienced trial judge should have realized that such a long wrangle in the jury room as occurred in this case would leave the jury in a state of frayed nerves and fatigued attention, with the desire to go home and escape overnight detention, particularly in view of a plain hint from the judge that a verdict ought to be forthcoming. The jury was obviously in doubt as to Bollenbach's participation in the theft of the securities in Minneapolis and their transportation to New York. The jury's questions...clearly indicated that the jurors were confused... Discharge of the jury's responsibility for drawing appropriate conclusions

> from the testimony depend on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties, a trial judge should clear them away with concrete accuracy... A conviction ought not to rest on an equivocal direction to the jury on a basic issue.

(See also: United States v. Silver, 457 F.2d 1217 (3d Cir., 1980) and United States v. Anderton, 629 F.2d 1044 (5th Cir., 1980), both of which are entrapment cases, the latter making particular reference to the need for clarifying instructions as to terms of legal significance where the jury has made known its difficulty.)

Because of this apparent confusion on the issue of when, in relation to the transactions, predisposition is to be determined, those cases upholding inconsistent verdicts are not applicable. Dunn v. United States, 284 U.S. 390 (1931) was based upon the jury's historic power of lenity. That this was the basis for the decision was reaffirmed by this Court as late as last year in Harris v. Rivera, ___ U.S. ___, No. 81-17, December 14, 1981). Here we deal not with jury lenity, but jury confusion on a basic issue and cases on inconsistent verdicts have no application.

The Court of Appeals also on the issue of clarifying instructions sua sponte raised the issue of waiver, even though the issue was never briefed by either side. The decision below stressed that trial counsel for petitioner had agreed to the district court's response. This agreement was

reached during a conference telephone call among the trial judge and respective counsel. Petitioner was not present, nor had he personally waived the right to be present. Significant questions as to the validity of any waiver by petitioner's trial counsel outside his presence should not have been decided without the opportunity for complete briefing. (See: United States v. Rich, 589 F.2d 1025 (10th Cir., 1978), holding that a defendant's trial counsel may not waive his client's constitutional rights in ex parte meetings with the trial judge.)

4. Petitioner, and his co-defendant Carter, both received prior to trial offers from the government that in return for a plea, the government would recommend a sentence of 90 days. The district court did accept that recommendation with respect to the sentence of 90 days imposed on Carter upon his plea. Petitioner, who elected to

exercise his right to trial however, received sentences of three years imprisonment to be followed by five years probation.

The Court of Appeals, in affirming the sentence, stated that petitioner produced no evidence apart from the disparity of sentences to support a claim or even raise the inference that the heavier sentence was a penalty for pleading not guilty. (See Appendix A, p.11)

Despite this view of the court below, there is evidence to support such an inference. Both defendants were made the same offer by the government. As to the co-defendant the district court found the sentence recommendations appropriate. Certainly, the inference is plain that the district court would have imposed the same sentence with respect to petitioner.

Whether or not the sentence was a penalty for going to trial, the record

leaves unrebutted such an inference. In an analagous situation, in United States v. Stockwell, 472 F.2d 1186 (9th Cir., 1973) the Court held that the mere appearance of such a practice would have a chilling effect upon constitutional rights. The Court held that the record must affirmatively show that the heavier sentence was based solely on the facts of the case and the defendant's personal history and not as punishment for his refusal to plead guilty. (Cf. North Carolina v. Pearce, 395 U.S. 711 (1969).

## VII.

## CONCLUSION

Petitioner, Anthony R. Fields, respectfully urges that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

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November, 1982

APPENDIX A

In the

# United States Court of Appeals

## For the Seventh Circuit

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No. 81-3064

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

ANTHONY R. FIELDS,

*Defendant-Appellant.*

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Appeal from the United States District Court for the Southern District of Indiana.
No. IP-81-54-CR—James E. Noland, *Judge.*

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ARGUED JUNE 9, 1982—DECIDED SEPTEMBER 14, 1982

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Before PELL and BAUER, *Circuit Judges*, and DECKER, *Senior District Judge.**

DECKER, *Senior District Judge.* Defendant-Appellant Anthony R. Fields appeals from his conviction on three counts of knowingly acquiring and possessing food stamp coupons in a manner not authorized by law. 7 U.S.C. §2024(b). Fields claims numerous errors by the district court, particularly with respect to his defense of entrapment. We affirm.

Anthony Fields is the proprietor of the D & P Variety Store in Indianapolis, Indiana. The D & P Variety Store

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* Of the Northern District of Illinois.

sells neither food nor other retail merchandise, and is not authorized by the United States Department of Agriculture to accept food stamps.[1] Viewed in the light most favorable to the government, *see Jackson v. Virginia*, 443 U.S. 307, 319 (1979), the evidence established that on February 18, 1981, Robyn Stewart and Ernest Stanford, Jr., two federal undercover agents from the Department of Agriculture and the Treasury Department's Bureau of Alcohol, Tobacco and Firearms, respectively, met with Fields outside of his store and offered to sell him a quantity of food stamps at a discount, which he could then redeem illegally for cash. It is undisputed that prior to the time of that meeting, the agents had no knowledge that Fields had actually dealt illegally in food stamps in the past. Fields' name arose in that connection, however, during an unrelated investigation by the Treasury Department into illegal firearms sales, when one of the subjects of that investigation, Eugene Carter, told undercover agents that he knew someone, Fields, who might be willing to deal illegally in food stamps.[2]

Fields told Agents Stewart and Stanford that he was interested in dealing in the stamps and, when asked, indicated to them that he was willing to do so on a regular basis. Agent Stewart then proposed to sell Fields $2600.00 in food stamps for $1300.00. After Fields made a telephone call to check the serial numbers of the stamps against the food stamp alert bulletin (or "hot sheet"), and found that the stamps were "cool," he agreed to the purchase, and the parties completed the transaction.

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[1] The record, in fact, fails to reveal what, if anything, was sold at the D & P Variety Store.

[2] Carter was indicted with Fields on one count of unlawful acquisition or possession of food stamps, and one count of conspiracy to violate 7 U.S.C. §2024(b). Before trial, Carter pleaded guilty to one count of unlawful acquisition and possession, and the government dropped the conspiracy charges against both defendants. Carter was given a three-month prison sentence.

On February 26, 1981, Agents Stewart and Stanford returned to the D & P Variety store with $1950.00 in food stamps. After some dickering about price, Fields purchased the stamps from the agents for $800.00. On March 26, 1981, the parties met again, and the agents sold Fields $1300.00 in food stamps for $530.00.

On April 24, 1981, the agents brought $17,225.00 in food stamps to Fields' store. Fields only agreed to purchase approximately $6100.00 in stamps, however, for $2000.00. While the money was on the counter and Fields was holding the bag containing the stamps, counting them, federal agents entered the store and arrested Fields.

The jury found Fields guilty of unlawful acquisition and possession of food stamps based on the transactions of February 26, March 26, and April 24, 1981, and found him not guilty of the same charges for the transaction of February 18. Fields claims that he was entrapped as to all four of the transactions. First he has argued that the district court erred in denying his motion for a directed verdict on all counts because the evidence was insufficient to establish beyond a reasonable doubt that he was not entrapped, a fact which he claims was supported by the jury's acquittal for the February 18 transaction. He has also argued that the district court improperly instructed the jury on the entrapment defense; that the court erred in its responses to questions sent out by the jury during deliberations; and that the evidence was insufficient to sustain a conviction for the April 24 transaction, when he and Stanford were interrupted before the transaction was completed. Finally, Fields claims that the district court's sentence of two concurrent three-year prison terms, followed by five years of probation, was improper in light of the three-month sentence given to Carter. The court will consider each of these arguments in turn.

## I.

Fields' first claim is that the evidence presented at trial was insufficient to establish, beyond a reasonable

doubt, that he was not entrapped by the government agents. At trial, Fields admitted to having participated in the transactions for which he was charged, but claimed that he was not at all predisposed to do so prior to being approached by the agents and he did so here only as a result of the government's inducement. In support of his claims, Fields testified that he had never dealt illegally in food stamps prior to February 18, 1981.

This court has recently held that where a defendant has introduced evidence of both government inducement and a lack of predisposition on the part of the defendant to commit the offense charged, the government must introduce "sufficient evidence from which a jury could conclude beyond a reasonable doubt that [the] defendant was predisposed to commit the offenses." *United States v. Hinkle*, 637 F.2d 1154, 1158 (7th Cir. 1981). The term "predisposition" refers to whether the defendant had a readiness and willingness to commit the offenses charged, or whether the government "implant[ed] in the mind of an innocent person" the disposition to commit the offense. *Sorrells v. United States*, 287 U.S. 435, 442 (1932). *See also Sherman v. United States*, 356 U.S. 369, 375 (1958). Predisposition may be established by evidence of a defendant's personal background, and by evidence of a defendant's conduct before or after the commission of the offense. *United States v. Carreon*, 626 F.2d 528 (7th Cir. 1980); *United States v. Townsend*, 555 F.2d 152 (7th Cir.), *cert. denied*, 434 U.S. 897 (1977).

In this case, there was ample evidence of Fields' predisposition before, during and after the commission of the offenses for which he was convicted. At trial, Fields testified that prior to being approached by the agents, he dealt in illegal lottery tickets as a means of support. When the agents presented Fields with the opportunity to deal illegally in stamps, too, Fields immediately indicated his willingness to do so on a regular basis, provided that the stamps were not on the hot sheet. At the agents' first meeting with Fields, he gave them two phone numbers where he could be reached when the agents acquired more stamps. Moreover,

Fields showed no reluctance about participating in the illegal transactions, as long as he was able to "milk" the stamps for all he could without getting caught. Each time he dealt with the agents, Fields negotiated a lower price for the stamps, explaining that he needed to pay off the individuals whose assistance was required to redeem the stamps, while keeping for himself a profit sufficient to justify his participation in the scheme. Such conduct on Fields' part, indicating his familiarity with the operation of a criminal enterprise and his willingness to participate in the stamp "scam," when combined with his illegal activities prior to the government's undercover investigation, constitutes sufficient evidence of Fields' predisposition to support a conviction. *See Sherman v. United States, supra.*

The Ninth Circuit has recently addressed the issues of entrapment and criminal predisposition in the context of the government's food stamp investigations. In *United States v. Abushi*, No. 81-1030 (9th Cir. June 8, 1982), four individuals were convicted of illegally acquiring and redeeming food stamps after special agents of the Agriculture Department sold them several thousand dollars in food stamps in undercover transactions resembling those in issue here. Like Fields, defendants in *Abushi* claimed unsuccessfully at trial that they had been entrapped by the federal agents. The Ninth Circuit affirmed the convictions, finding considerable evidence of predisposition similar to that presented here:

> "[T]here is substantial evidence to establish the predisposition of all four appellants. They showed little, if any, real resistance to participation in the food stamp transactions when they were proposed by the government agents, nor were they concerned about the illegal nature of that activity.
>
> . . . .
>
> "It is clear from [one agent's] testimony that all she needed to do to effectuate a given sale was to inform Abushi that she was carrying some stamps which she wanted to sell, and negotiate with him over the price."

Slip op. at 2448. The Ninth Circuit's conclusion in *Abushi* is particularly appropriate in the case at bar:

> "The appellants have not pointed to any evidence indicating a reluctance on their part to engage in the illegal activity. To the contrary, the record is replete with instances where the appellants appeared eager to negotiate then and in the future. Although the government made the initial contact with the appellants, this is merely evidence that the government furnished the opportunity for the commission of a crime, not that the appellants were entrapped. *United States v. Glaeser*, 550 F.2d 483, 487 (9th Cir. 1977)."

Slip op. at 2448-49.

The court finds that there was sufficient evidence of predisposition in Mr. Fields' case for a rational fact-finder to conclude, beyond a reasonable doubt, that Fields was not entrapped.

Addressing briefly Fields' suggestion that the jury's acquittal on the February 18 charges based on entrapment in some way requires a reversal of his conviction for the subsequent offenses, the court knows of no per se rule which provides that the taint of a first entrapment requires judgments of acquittal as to all subsequent transactions. *See, e.g., United States v. West*, 511 F.2d 1083 (3d Cir. 1975), *United States v. Hill*, 481 F.Supp. 558, 560-61 (E.D.Pa. 1979), *rev'd on other grounds*, 655 F.2d 512 (3d Cir. 1981). To the contrary, as long as the evidence was sufficient to support the counts on which the defendant was actually convicted, a jury verdict reflecting compromise or even inconsistency is permissible and legitimate. *United States v. Jacobs*, 632 F.2d 695, 697 (7th Cir. 1980). In this case, moreover, the jury verdict was not necessarily inconsistent. Even if the jury found Fields not guilty of the February 18 offense because they found the evidence insufficient to establish beyond a reasonable doubt that Fields had not been entrapped *on that date*, this court finds that the additional evidence of Fields' post-February 18 conduct, including

the readiness with which he entered into subsequent transactions and the manner in which he negotiated successively lower prices for the stamps so that he could make the proper payoffs, clearly establishes the requisite predisposition as to all subsequent transactions. *See Abushi, supra; Carreon, supra.* Therefore, the court rejects Fields' arguments that his conviction for only the subsequent offenses was improper.

II.

Fields has argued that the district court's jury instructions did not convey to the jury the precise and specific elements of the entrapment defense because they failed to instruct the jury on the meaning of "predisposition," and inform them that the government bore the burden of proving Fields' predisposition beyond a reasonable doubt. Therefore, Fields claims, the district court erred in rejecting the entrapment instructions which he submitted.

The district court gave the following entrapment instructions to the jury:

> *"Instruction No. 20.* One of the issues in this case is whether the Defendant was entrapped. A Defendant who has been entrapped must be found not guilty.
>
> "If the defendant had no prior intent or predisposition to commit the offense charged, and was induced or persuaded to do so by law enforcement officers or their agents, then he was entrapped. If, however, the Defendant had a prior intent or predisposition to commit the offense charged, then he was not entrapped, even though law enforcement officers or their agents provided a favorable opportunity to commit the offense, made committing the offense easier, or even participated in acts essential to the offense.
>
> "In determining whether the Defendant had a prior intent or predisposition to commit the offense

> charged, you may consider the personal background of the Defendant as well as the nature and degree of any inducement or persuasion of the Defendant by law enforcement officers or their agents."
>
> "*Instruction No. 20-A.* The issue of entrapment has been raised by the Defendant, Anthony R. Fields. He does not dispute that he entered into transactions prohibited by statute. The government must prove beyond a reasonable doubt that the Defendant was not entrapped."

Instruction No. 20 is identical to Instruction 4.04, "Entrapment," *Federal Criminal Jury Instructions of the Seventh Circuit*, (prepared by the Committee on Federal Jury Instructions of the Seventh Circuit, and approved in principle by the Judicial Council of the Seventh Circuit, 1980) [West]. *See United States v. Read*, 658 F.2d 1225, 1237 (7th Cir. 1981). The court finds no error in the district court's instructions.

Contrary to Fields' arguments, it is clear from the express language in the district court's instructions that the government bore the burden of proving beyond a reasonable doubt that Fields had not been entrapped, and that that required a finding, beyond a reasonable doubt, that Fields was predisposed to commit the offenses with which he had been charged. *See United States v. Johnson*, 605 F.2d 1025 (7th Cir. 1979), *cert. denied*, 444 U.S. 1033 (1980). Furthermore, the court finds that the substance of the instruction, which described entrapment in terms of "prior intent or predisposition," and told the jury that they could consider both the background of the defendant and the nature and degree of the government's inducements in determining whether he was predisposed to commit the offenses, presented an accurate statement of the law concerning entrapment. *See Sherman v. United States*, 356 U.S. at 382 (Frankfurter, J., concurring); *United States v. Abushi, supra; United States v. Hinkle, supra; United States v. Carreon, supra.* Under those circumstances, we find that the district court did not err in refusing to give the defendant's requested instructions. *United States v. Park*, 421 U.S. 658, 675 (1975).

As a corollary to Fields' challenge to the adequacy of the jury instructions, Fields has argued that the district court erred in its treatment of two of the questions which the jury sent the judge during deliberations. At one point in the deliberations, the jury sent out a note asking for a legal dictionary. The court refused the request. Later, the jury sent out another note, asking "Does prior intent or predisposition mean prior to the proposal or prior to the offense?" The court answered by referring the jury to the court's original entrapment instruction: "The members of the jury are required to rely on their own observations and experiences in making a judgment. Further, careful reading of Instruction No. 20 should assist you." Fields claims that the jury's questions reflected confusion about the entrapment defense, and that the district court erred in failing to give a clarifying instruction on the meaning of predisposition.

A review of the proceedings in the trial court reveals that counsel for both the government and Fields were consulted before the district court responded to either of the above questions, and both sides agreed to the answers which were given. *See* Transcript of Hearing on Clarification of Record Re Jury Notes, January 20, 1982 at 3-5. If the defendant believed that the proper response to the jury's second question above was a clarifying instruction rather than a reference to the original entrapment instruction, that concern should have been raised before the district court at the time the question was first raised, and it will not be entertained for the first time on appeal.

Addressing the jury's questions themselves as evidence of juror confusion, the court finds that at best, the questions indicated a desire for a clarifying instruction, and not juror confusion. The jury's notes simply do not establish that the original instructions were "so vague or ambiguous as to reasonably permit misinterpretation of the entrapment instruction." *United States v. Johnson*, 605 F.2d at 1029. The questions themselves do not establish that the district court's instructions were improper.

III.

Fields has argued that the evidence of the April 24, 1981, transaction was insufficient to sustain a conviction because the transaction in which he was to have acquired the food stamps was never completed. It was not completed, he maintains, because Agent Stanford never took the money for the stamps, and Fields never exercised control over the stamps. The court disagrees.

Read in the light most favorable to the government, the evidence at trial established that the April 24 transaction was interrupted by the arresting officers only after Fields had taken a bag from Agent Stanford containing approximately $6100.00 in food stamps, and had begun counting the stamps in the bag. Prior to doing so, the agents testified, Fields had agreed to purchase the stamps for $2000.00 in cash. According to Agent Stanford's testimony, moreover, as Fields took the stamps, he set the money on the counter and said: "Here is the money for the stamps." Based on that evidence, this court believes that a rational jury could have concluded beyond a reasonable doubt that on April 24, Fields "acquire[d]" or "possess[ed]" food stamps in a manner not authorized by law. 7 U.S.C. §2024(b).

IV.

Finally, Fields has challenged the severity of the district court's concurrent three-year prison sentences and probation, when compared with the three-month sentence given to co-defendant Carter, who pleaded guilty to one count of unauthorized acquisition. Fields contends that he was issued the harsher sentence because he refused to plead guilty.

The standard of review to be applied to a district court's sentencing decisions is whether the trial court abused its discretion. Beyond that, it is not the function of the appellate court to review the sentence imposed on a criminal defendant. *See United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978); *United States v. Main*, 598 F.2d 1086 (7th Cir.), *cert. denied*, 444 U.S. 943 (1979).

This court has held repeatedly that the mere fact that a defendant who proceeded to trial received a heavier sentence than did a co-defendant who pleaded guilty does not establish an abuse of the trial court's discretion. *E.g., United States v. Santiago*, 582 F.2d at 1137; *United States v. Melendez*, 355 F.2d 914 (7th Cir. 1966).

In this case, Fields has produced no evidence that he was penalized for pleading not guilty except for the fact of the disparate sentence itself. Since this court can find no other evidence in the record which even might support an inference of disparate treatment as a result of Fields' not guilty plea, and the trial court's sentence was within the limits prescribed for the offenses for which Fields was convicted, 7 U.S.C. §2024(b), the district court's sentence will be left undisturbed.

V.

For all of the reasons stated above, the defendant's conviction is

AFFIRMED.

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

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## APPENDIX B

### AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

TITLE 7 U.S.C.

Sec. 2024. Violations and Enforcement

* * *

(b) Whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorizat on cards in any manner not authorized by this Act or the regulations issued pursuant to this Act shall, if such coupons or authorizations cards are of the value of $100 or more, be guilty of a felony and shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, or, if such

coupons or authorization cards are of a value of less than $100, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than $1,000 or imprisoned for not more than one year, or both.

* * *

TITLE 18 U.S.C.

Sec. 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

TITLE 18 U.S.C.

Sec. 846. Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

## APPENDIX C

"Court's Instruction No. 20. One of the issues in this case is whether the Defendant who has been entrapped must be found not guilty.

If the defendant had no prior intent or predisposition to commit the offense charged, and was induced or persuaded to do so by law enforcement officers or their agents, then he was entrapped. If, however, the Defendant had a prior intent or predisposition to commit the offense charged, then he was not entrapped, even though law enforcement officers or their agents provided a favorable opportunity to commit the offense, made committing the offense easier, or even participated in acts essential to the offense.

In determining whether the Defendant had a prior intent or predisposition to commit the offense charged, you may consider

the personal background of the Defendant as well as the nature and degree of any inducement or persuasion of the Defendant by law enforcement officers or their agents."

"Courts Instruction No. 20-A. The issue of entrapment has been raised by the Defendant, Anthony R. Fields. He does not dispute that he entered into transactions prohibited by statute. The government must prove beyond a reasonable doubt that the Defendant was not entrapped."

"Defendant's Instruction No. 6. The word predisposition means a previous or prior inclination or tendency to do an act."